In fact, these cases do not acknowledge this contention, implicitly or otherwise. Petitioners do not, and cannot, point to any statement in any of these opinions where the courts mention any sort of due process implications arising from general damage awards. Indeed, one would be hard pressed to point out any reference to the phrase "due process" anywhere in the opinions, or even the word "constitution". In sum, the statement made by the petitioners, excerpted above, is not supported in any manner by the above-referenced cases nor elsewhere in the Louisiana jurisprudence.

Finally, petitioners assert that the Louisiana Supreme Ccurt's holding in *Green v. K-Mart Corporation*, 874 So.2d 838, 03-2495 (La. 5/25/04), read in conjunction with the U.S. Supreme Court decision in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1999), provides a basis for the statement that "[p]ersons injured in Louisiana through the wrongful conduct of another have a constitutionally protected interest to be fairly and adequately compensated through compensatory . . . damages . . . " (p. 5, petition). Once more, this position finds no support in the cases cited by the petitioners or anywhere else in the Louisiana or Supreme Court Jurisprudence. The court in *Green* held simply that it was an abuse of discretion for the lower court to award special damages for medical expenses, but to allow an award of -0- for general damages, where it is clear that the plaintiff suffered injury and resultant pain and suffering. Petitioners characterize the court's holding as a charge to Louisiana's juries that "where the trier of fact determines that the plaintiff has suffered injuries causally related to the accident and received medical treatment for those injuries, then it is *mandatory* to award general or compensatory

damages for those injuries" (p. 5, petition). Petitioners then use an out-of-context quote from the *Thompson* case supposedly to substantiate a "constitutionally protected result to general damages" as an argument, stating that "[t]he use of 'explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [constitutionally protected] interest'" (p. 5, petition, quoting *Thompson*, 490 U.S. at 463).

Petitioners' assertions that the *Green* and *Thompson* decisions rendered by the Louisiana and U.S. Supreme Courts impose a mandatory award of general damages when special damages are awarded is erroneous. First, nowhere in the *Green* opinion does the court say anything remotely close to the statement petitioners ascribe to the decision, i.e. that it is mandatory for courts to award general damages where medical damages are awarded and the plaintiff has in fact been injured. The court simply states, relying on their holding in the previous case of *Wainwright v. Fontenot*, 774 So.2d 70, 2000-0492 (La. 10/17/00), that "When, as here, the jury has awarded special damages but has declined to award general damages, the reviewing court must determine whether the jury's finding 'is so inconsistent as to constitute an abuse of discretion.'" *Green*, quoting *Wainwright*, 874 So.2d at 844.

In the case at bar, the Louisiana Second Circuit Court of Appeal determined that the jury award was not an abuse of discretion, and the Louisiana Supreme Court declined petitioners' writ of certiorari. Thus, the reviewing courts have determined exactly what was required in *Green*. Moreover, the *Thompson* case, involving constitutionally protected *liberty* interests of prisoners, does not announce a general principal of law regarding constitutionally protected

interests, as the petitioners would have this Honorable Court believe. The *Thompson* case is limited in application to protected liberty interests in the prison context, and is completely irrelevant to the instant matter.

CONCLUSION

The ruling of the Louisiana Second Circuit Court of Appeals, determining that the trial judge's grant of JNOV in this matter was an error of law, is correct and should be upheld. The jury was fully aware of the prior tender of $30,000 to Tolbird and incorporated that knowledge into their verdict. Petitioners have failed to show that the jury abused its discretion. Furthermore, petitioners have cited jurisprudence that does not in fact support the contentions that petitioners are alleging, in an effort to create a non-existent federal right, to raise a non-existent federal question. Petitioners attempt to create a due process violation by piecing together portions of opinions that stand for other propositions because there is no case law supporting their claims. The petition for writ of certiorari should be denied.

Respectfully submitted,

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